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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 372

TIMES FILM CORPORATION,

Petitioner,

v.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner, Times Film Corporation, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 21, 1957.

Citations to Opinions Below

The Master's Report is unreported, appears in the Transcript of Record at pp. 267-286 and is attached hereto as Appendix A. The opinion of the United

States District Court for the Northern District of Illinois, Eastern Division, is reported in 139 F. Supp. 837, appears in the Transcript of Record at pp. 289-305, and is attached hereto as Appendix B. The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 244 F. 2d 432, and is attached hereto as Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered May 21, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Are the provisions of the Chicago ordinance, providing for censorship of all motion pictures prior to their exhibition, and prohibiting the exhibition of all motion pictures which are "immoral and obscene", unconstitutional as an infringement of rights guaranteed by the First and Fourteenth Amendments?

2. Is the application of the Chicago ordinance so as to ban the exhibition of the motion picture entitled "The Game of Love" a violation of rights protected under the First and Fourteenth Amendments?

Statutory Provisions

The statutory provisions involved are Sections 1-7 of Chapter 155 of the Municipal Code of the City of Chicago; and the First and Fourteenth Amendments of the United States Constitution. They are printed in Appendices D and E, *infra*, pp. 61a to 67a.

Statement

As the complaint indicates (Transcript of Record, pp. 4-7) Petitioner, Times Film Corporation, has the exclusive right to distribute, to license for public exhibition and to exhibit in the City of Chicago, the motion picture entitled "The Game of Love", a film produced in France based on a novel by Colette, in the French language with superimposed English subtitles.

Petitioner applied for a permit to publicly exhibit "The Game of Love", as required under Sections 155-1 to 155-7 of the Municipal Code of Chicago, pursuant to which Respondents purport to act. On May 6, 1955, the Police Censor Board, which has been designated by the Commissioner of Police to act on his behalf, refused a permit to Petitioner on the grounds that "The Game of Love" was ". . . not acceptable to standards of decency with immorality featured and dialogue unfit".

On June 6, 1955, Petitioner appealed the decision of the Police Censor Board to Richard J. Daley, Mayor of the City of Chicago and one of the Respondents herein, and on June 20, 1955, the latter affirmed the decision of the Censor Board refusing Petitioner

a license to exhibit the film publicly. Respondent Daley based his denial on the ground that "The Game of Love" was "immoral and obscene".

Petitioner thereupon commenced the above entitled action on July 7, 1955, by the filing of a Complaint against the City of Chicago, the Mayor, and the Police Commissioner, the Respondents herein, in the United States District Court for the Northern District of Illinois, Eastern Division.

The case was referred to a Master in Chancery. After hearings before the Master took place and "The Game of Love" was viewed by him, the Master filed his Report on January 31, 1956, in which he made Findings of Fact and Conclusions of Law (R. pp. 267-285; App. A, *infra,* pp. 1a-30a). In essence, the Master concluded that Sections 155-1 to 155-7 of the Municipal Code of Chicago were unconstitutional, that if constitutional, they had been unconstitutionally applied, and that in any event the film was not immoral or obscene under the ordinance.

Respondents filed objections to the Findings of Fact and Conclusions of Law contained in the Master's Report. These objections were sustained by the District Court (R. p. 297; App. B, *infra,* pp. 31a-52a), which held that "The Game of Love" was obscene and the censorship ordinance valid. It thereupon ordered the complaint dismissed.

Petitioner appealed the decision to the United States Court of Appeals for the Seventh Circuit, which upheld the lower court on all counts in its

decision handed down May 21, 1957 (App. C, *infra*, pp. 53a-61a).

Jurisdiction in the District Court was invoked under 28 U. S. C. Sections 1331 and 1332, in that the action arises under the Fourteenth Amendment to the Constitution of the United States and in that there is diversity of citizenship between the Petitioner, a citizen of the State of New York, and Respondents, all of whom are citizens of the State of Illinois. The amount in controversy exceeds $3,000 exclusive of interest and costs.

Reasons for Granting the Writ

1. *The Court below has decided a federal question in a manner conflicting with the applicable decisions of this Court.* Since the holding of the Supreme Court in *Burstyn* v. *Wilson*, 343 U. S. 495 (1952), it is settled law that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments" (p. 502). In decisions subsequent to the *Burstyn* case, this Court has consistently struck down state laws providing for the censorship of motion pictures. In *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870 (1955), the Court, in a per curiam decision, held invalid a Kansas statute providing for censorship of all motion pictures, and for the banning of those which were "obscene, or immoral". There is no substantial difference between the Kansas statute and the Chicago ordinance here in question.

The relevant parts of the ordinance upheld by the courts below make it unlawful for any person to pub-

licly exhibit *any* motion picture in the City of Chicago without first securing a license therefor from the Commissioner of Police. This permit, according to the ordinance, is to be granted only after censorship of the contents of each motion picture and then only if the Commissioner finds that the motion picture is not "immoral or obscene". This Court has repeatedly struck down enactments aimed at imposing a prior restraint on communications protected by the First and Fourteenth Amendments. In *Near* v. *Minnesota,* 283 U. S. 697 (1931), the principle was reiterated that freedom of expression is the rule and that this freedom is as close to absolute as is possible under our system of government:

> "The exceptional nature of its (freedom's) limitations places in a strong light the general conception that liberty of the press has meant, principally, although not exclusively, immunity from previous restraints or censorship" (p. 716).

This Court restated the rule most recently in *Kingsley Books, Inc.* v. *Brown,* 25 Law Week 50, Page 4557 (1957), in upholding a remedial scheme in connection with a statute providing for the conviction of distributors of obscene literature:

> "To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may be fairly deemed licensing or censorship" (p. 4558).

This Court has never approved a statute imposing censorship on content. Indeed, every licensing statute remotely involving the area of communications has been subjected to close scrutiny, and only where

the statute could be fairly deemed to regulate "with regard only to considerations of time, place and manner so as to conserve the public convenience", *Cox* v. *New Hampshire*, 312 U. S. 569, at 575, 576, has it been permitted to stand. See also *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

The approval of the Chicago ordinance by the lower courts cannot be squared with the previous decisions of this Court.

2. *The Court below has decided an important question of federal law which has not been but should be settled by this Court.*

A. Many of the lower courts have sought to limit the *Burstyn* case, *supra*, and the other subsequent motion picture cases to their facts in an attempt to uphold state censorship laws. The cardinal principle of the *Burstyn* case has thus eroded into question of whether the censorship authority can establish to the court that the words used in its enabling legislation are somehow different in kind or in quality from those used in the New York statute involved in *Burstyn, supra;* in *Commercial Pictures* v. *Board of Regents*, 346 U. S. 587 (1954); in the Texas statute involved in *Gelling* v. *Texas*, 343 U. S. 960 (1952); in the Ohio statute involved in *Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587 (1954); or in the Kansas statute involved in *Holmby* v. *Vaughn*, *supra*. Since such an important area of federal law has become beclouded, certiorari ought to be granted in this case to state clearly that motion pictures, like newspapers, speech, and other media of communication, are not subject to prior restraint. While

this Court's decisions of last term, dealing with the question of obscenity, have restated the fundamental proposition that freedom of communication means freedom from prior restraint, nevertheless, enough ambiguity remains to breed a vast progeny of litigation.

The extensive litigation and different results involving the very Chicago ordinance in question illustrate this difficulty. The same ordinance was applied by the Board of Censors to ban the motion picture "The Miracle" (which was the subject matter of the *Burstyn* case, *supra*). The Illinois trial court found that "The Miracle" could not be banned under the ordinance in the light of the *Burstyn* case. The Illinois Supreme Court reversed and remanded that decision. *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 121 N. E. 2d, 585 (1954). However, in so doing, it attempted to limit the application of the ordinance generally by defining an "obscene" film as follows:

> ". . . if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess" (p. 592).

The court went on to equate immorality with obscenity holding that they were synonymous standards for purposes of applying the Chicago ordinance to a motion picture. The record in this case clearly demonstrates how impossible it was for a body of laymen, the Board of Censors, to apply that definition in its censorship activities. Indeed, the dichotomy between

the Illinois Supreme Court's attempt to limit the ordinance and the Board of Censors' incapacity to apply the limitation acutely points up the reason to the historic opposition to any prior restraint on communications.

Following the Illinois Supreme Court's decision, this Court refused to review the case, specifically giving as its reason for refusal the absence of a final judgment. Three Justices dissented from the refusal to review (348 U. S. 979) (1955). Upon remand to the trial court, "The Miracle" was found to be obscene and the banning by the Board of Censors upheld. The case was thereupon appealed to the Illinois Appellate Court which reversed the decision of the trial court and directed the Board of Censors to issue a permit (141 N. E. 2d, 56) (1957).

The case at hand demonstrates the same confusion. The Master in Chancery who heard the witnesses and saw the motion picture found the ordinance unconstitutional (R. pp. 280, 282; App. A, *infra*, pp. 1a-30a); the Master further held that in any event the motion picture was not obscene within the meaning of the ordinance (R. p. 283). The District Court impaneled an advisory jury which was instructed to make a finding as to whether "The Game of Love" was obscene or was not obscene. No further instructions were given the jury. Eleven of the jurors returned a finding that the motion picture was obscene. One juror found that it was not obscene. (On motion of plaintiff, the court vacated the order impaneling the jury, R. p. 297).

The District Court after viewing the motion picture reversed the findings and conclusions of the Master in Chancery. It found the ordinance constitutional and the motion picture obscene. The Court of Appeals agreed (Apps. B and C, *infra*, pp. 31a to 61a).

Thus a single censorship ordinance is given diametrically opposite constructions and applications by a group of competent tribunals, both state and federal—all of which claim to be applying the principles laid down by this Court in the *Burstyn* case. We think it clear that only by granting certiorari in this case can this Court once and for all enunciate the law of the land as to censorship of motion pictures.

B. The construction placed upon the words "obscene or immoral" by the Illinois Supreme Court in *American Civil Liberties Union* v. *City of Chicago*, *supra*, relied upon by Respondents in the case at hand, cannot be squared with proscription set forth by this Court that "sex and obscenity are not synonymous". *Alberts* v. *California*, 25 Law Week 50, p. 4539 on p. 4542 (1957). We can conceive of no reason why a broader definition of obscenity will be tolerated when applied to motion pictures than is tolerated when applied to books. The Court of Appeals makes it clear that it was relying on this broader definition to uphold the lower court's decision. By no stretch of the imagination can "The Game of Love" be held to deal with sex "in a manner appealing to prurient interests".

Moreover, the record is replete with testimony indicating that not even this broad definition of

"obscenity" was applied by the members of the Board of Censors, who were totally unfamiliar with the gloss placed on the ordinance by the Illinois Supreme Court in the *American Civil Liberties Union* v. *City of Chicago* case, *supra* (R. pp. 170, 180, 194, 200). In reaching the conclusion that "The Game of Love" was immoral and obscene under the ordinance, each of the censors relied on his own individual conception of these terms, far afield indeed from the Illinois Supreme Court construction (R. pp. 141, 142, 153, 166, 172, 180, 189, 197, 200, 202), and best summarized by one member as "I call them the way I see them" (R. p. 197); "artistic or other" merits were not taken into account (R. pp. 153, 166, 181, 190, 202); four censors testified that "The Game of Love" did not arouse their sexual desires, pruriently or otherwise (R. pp. 119, 143, 178, 179, 190, 201). The District Court, in sustaining all of the objections to the Master's Report, in effect threw out all of the testimony dealing with the artistic merits introduced by Petitioner, as well as all of the testimony dealing with the calculated purpose of the motion picture. Indeed, the testimony below is fascinating reading for proof of the proposition that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system" (*Hannegan* v. *Esquire*, 327 U. S. 146). It is proof of the proposition that once a prior restraint on communication is permitted, free speech becomes ephemeral. The testimony of the censors in this case amply demonstrates the need for this Court to grant certiorari and state unequivocally that a prior restraint on motion pictures is unconstitutionally alien to our freedom.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Master's Report

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Civil Action No. 55-C-1006

TIMES FILM CORPORATON,

Plaintiff-Appellant,

vs.

CITY OF CHICAGO, RICHARD J. DALEY and TIMOTHY J. O'CONNOR,

Defendants-Appellees.

The undersigned, David J. Shipman, Master in Chancery in and for said Court, respectfully reports to the Honorable J. Sam Perry, Judge of said Court, that pursuant to order of reference heretofore entered herein the undersigned has heard and taken evidence; has caused said evidence and the proceedings before him to be transcribed; files herewith the transcript of such evidence and proceedings together with the exhibits offered and his certificate of costs; and submits hereunder his findings of fact, conclusions of law and recommendations.

Appendix A

Master's Report

Introductory

1. This is an action for an order (a) directing the defendants (sometimes herein referred to simply as the City) to issue a permit for the plaintiff to exhibit a motion picture entitled "The Game of Love"; (b) restraining the City from interfering with the plaintiff in the exhibition of the picture; and (c) providing such other and further relief as justice shall require.

2. Federal jurisdiction is invoked because the amount in controversy exceeds $3,000.00 exclusive of costs and interest; and because there is diversity of citizenship between the parties as well as because the action arises under the First and Fourteenth Amendments to the Constitution of the United States.

3. The City had denied the application of the Plaintiff for a permit to exhibit the picture on the ground that it was immoral and obscene under a city ordinance requiring the City to refuse a permit if a picture is immoral and obscene.

4. The picture is based on a novel by Colette. It deals with the experience of a boy and a girl each about 16 years of age. In one episode it is clearly implied that the boy has sexual relations with an older woman and in another it is reasonable to infer that the boy and girl have such relations with each other. (The Master will treat the picture in greater detail in his findings of fact.)

Appendix A

Master's Report

5. The film of the picture was made part of the complaint as Exhibit A, and was introduced in evidence by the City as Defendants' Exhibit 1.

6. A copy of the City Ordinance with reference to the exhibition of motion pictures (Municipal Code of the City of Chicago, Chapter 155, Sections 155-1 through 155-7) was attached to the complaint as Exhibit B.

7. During the hearings the film was exhibited to the Master in the presence of the Court Reporter and of Counsel for the parties.

8. The Plaintiff presented as witnesses, its own Vice-President, and under Rule 43b the City's Commissioner of Police, his Deputy in Charge of Censorship matters, and the five persons who were members of its Censorship Board at the time the film was considered for a permit.

9. The Plaintiff introduced exhibits to show certain artistic awards for the film; the processing of its application for a permit; part of the records of the City in the processing of another film; and numerous reviews, announcements and advertisements about the film clipped from newspapers in other cities where the film was shown.

10. The City introduced no witnesses but introduced the film as its exhibit and arranged for its showing to the Master.

11. Counsel for both sides argued orally and submitted written briefs.

12. From the pleadings, the evidence presented and the arguments of counsel, the Master understands the respective positions of the parties briefly to be as hereunder set forth.

13. The Plaintiff's position is as follows:

a. The Ordinance is unconstitutional on its face under the First and Fourteenth Amendments to the Constitution.

b. Even though the Ordinance were held to be constitutional, the operations of the City's censorship authorities are unconstitutional and particularly so with reference to the processing of this film.

c. Even though the Ordinance and the operations of the City's censorship authorities are constitutional, the picture does not fall within any of the categories set forth in the Ordinance for which permits are to be denied. More specifically, that the picture is not immoral or obscene.

14. The City's position is as follows:

a. The Ordinance is constitutional under the First and Fourteenth Amendments.

b. The operations of the City's censorship authorities under the Ordinance are constitutional and particularly so with reference to the processing of this film for a permit.

c. The picture is immoral and obscene.

Appendix A

Master's Report

15. As the hearings progressed and especially after viewing the film, it appeared to the Master that the interests of children and adolescents might require different treatment from adults; and that this question might justify an exploration of other evidence and arguments than those offered by the parties in support of their respective positions.

16. The Master made known to counsel for the parties his special concern in this area and a number of discussions were held with counsel for both sides in an effort to bring such evidence and arguments before the Master.

17. The appointment of amici curiae and the summoning of experts in fields such as education, child psychology, art, literature and semantics either by the parties, or by the Master, or by both, were discussed.

18. As a result of these discussions and in order to save the time and expense incident to such an effort, counsel for the Plaintiff offered to assure the Master that the Plaintiff would not show or permit the showing of the film to any persons under the age of eighteen and would not object to a restraining order to that effect provided that any rights, if any, which it might otherwise have to show the film would in no way be impaired.

19. In confirmation of its offer, counsel for the Plaintiff delivered a letter dated January 25, 1956 to the Master and copy to counsel for the City. An extra copy of that letter is initialed by counsel for

both sides and made part of the record as Master's Exhibit 1.

20. In view of this offer by Plaintiff, the Master, except where otherwise indicated, considered his findings and conclusions on the basis that the picture would be shown only to persons over the age of eighteen.

21. In the absence of other evidence than is now in the record, the Master's findings and conclusions would not be modified if the picture were to be exhibited only to adults over a higher age than eighteen; but as indicated they might be different if the picture were to be exhibited to persons under eighteen or under a lower age.

22. At the suggestion of the Master and by agreement of Counsel in order to keep the record concise, the proceedings were repeatedly taken off the record by the Master or the parties. As a result, while the record is much less cumbersome and confusing than it might otherwise have been, it does not fully disclose the extent to which counsel cooperated with each other and with the Master in the presentation of this case.

23. The Master trusts that the Court will not consider it amiss for the Master to take this opportunity to commend Counsel, Messrs. Abner J. Mikva and Felix J. Bilgrey, for Plaintiff, and Messrs. John C. Melaniphy, Edward R. Hartigan and Daniel J. White for the City, for their consistent courtesy, industry and cooperation.

Appendix A

Master's Report

Findings of Fact

F-1. Plaintiff, Times Film Corporation, is a corporation organized and existing under the laws of the State of New York.

F-2. Defendant, City of Chicago, is a Municipal Corporation organized and existing under the laws of the State of Illinois.

F-3. Defendant, Richard J. Daley, is the Mayor of the City of Chicago.

F-4. Defendant, Timothy J. O'Connor, is the Commissioner of Police of the City of Chicago.

F-5. Plaintiff is a citizen of the State of New York and the Defendants are all citizens of the State of Illinois.

F-6. The action arises under the First and Fourteenth Amendments to the Constitution of the United States.

F-7. The matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs.

F-8. All of the defendants were properly served with summons and entered their appearances herein.

F-9. This Court has original jurisdiction of this action.

F-10. This Court has jurisdiction of the parties.

Appendix A

Master's Report

F-11. The Plaintiff has the exclusive right to distribute, to license for exhibition, and to exhibit in the City of Chicago a certain photoplay or motion picture film entitled "The Game of Love" a print of which picture was attached to the complaint as Exhibit A and made a part thereof and introduced in evidence by the Defendants as their Exhibit 1.

F-12. Said motion picture, herein sometimes referred to as the film, is an adaptation of a novel entitled "Le Ble en Herbe" written by the French authoress Gabrielle Claudine Jouvenal under the pen name of Colette.

F-13. At all times relevant to this action, the Ordinance of the City of Chicago attached to the complaint as Exhibit B, was in full force and effect.

F-14. On or about May 6, 1955, Plaintiff applied to Defendant Police Commissioner O'Connor for a permit to exhibit the film.

F-15. On June 2, 1955 Defendant Police Commissioner O'Connor notified Plaintiff that he would not issue a permit because the commanding officer of his censor unit had rejected the film on the ground that it was not acceptable to standards of decency with immorality featured and dialogue unfit.

F-16. On June 6, 1955 Plaintiff appealed the decision of Defendant Police Commissioner O'Connor to Defendant Mayor Daley.

F-17. On June 20, 1955 Defendant Mayor Daley denied the appeal of the Plaintiff and based his denial on the ground that the film was immoral and obscene.

F-18. As a result the Plaintiff was refused a permit to exhibit the film "The Game of Love" in the City of Chicago.

F-19. Except for the purpose of evidence in this case, the Plaintiff has not publicly exhibited the film in the City of Chicago.

F-20. The Plaintiff has been directly damaged by not being able publicly to exhibit said film.

F-21. According to the testimony, the film is a faithful adaptation of the novel "Le Ble en Herbe".

F-22. In the course of the proceedings before him, the parties requested the Master to set forth in his findings the story of the film as it appeared to him.

F-23. The story as it appeared to the Master deals primarily with the experiences of two adolescents: a boy Philip, and a girl Vinca, each about 16 years of age.

F-24. They are having their summer vacation on the coast of France with their respective parents who live in the same boarding house.

F-25. At the beginning of the picture it appears that the girl has a romantic attachment for the boy; but that the boy is still at that state of adolescence in

which sports interest him more than girls do, and he rejects her advances.

F-26. In one of the opening episodes the boy is canoeing off shore when his canoe is upset. In the confusion he loses his clothes and finds himself coming up on shore without them. He finds a little girl's large straw hat close to the water's edge and, covering his private parts with the hat, he races along the beach.

F-27. At the same time a girls' school is having an outing on the beach and one of the little girls seeing the boy running along the beach with the hat says something to the effect that he need not try to cover himself because they have seen everything already.

F-28. The boy's backside is visible to the motion picture audience as he runs along the beach, but none of the boy's private parts is visible and there is no other problem of nudity connected with the film.

F-29. As the story develops, a mature woman, somewhere in her 30s or 40s, comes to the coast. The boy delivers bread to her home. She is attracted by him.

F-30. No acts of seduction nor any physical contact is shown between the woman and the boy; but it is clearly implied and not denied that she seduces him and that they are engaged in intimate sexual relations.

Appendix A

Master's Report

F-31. His seduction causes an awakening of the boy's sexual desires and for a period of several days and nights he is almost constantly in her company at the house which she occupies.

F-32. During this period the boy completely neglects his girl friend and his family.

F-33. Then for some reason which is not clear, the woman decides that the attachment must end and she terminates it abruptly.

F-34. The boy is greatly disturbed by the termination of his new and deeply emotional experience.

F-35. Meanwhile, the girl and the boy's mother both suspect what has been going on. Among other things, they observe a bite mark on the boy's shoulder which was apparently sustained in his relations with the older woman.

F-36. Subsequently the girl and boy acknowledge their romantic interest in each other and enter into a more mature relationship in which it may be reasonably inferred that they also have sexual relations.

F-37. This new relationship appears to bring them happiness.

F-38. It appears clearly to have resulted in great pleasure and satisfaction to the girl.

Appendix A

Master's Report

F-39. Then the summer comes to a close and the picture ends on a slight note of melancholy, such as one might experience at the end of a long summer vacation, or as if one were feeling the first pangs of growing older.

F-40. The parties agree that the above findings of the Master are a fair summary of what the film shows.

F-41. The picture nowhere expressly shows that serious and harmful consequences will result from the physical relations implied or inferred.

F-42. Whether or not harmful consequences of the conduct in question are suggested depends primarily on the maturity and experience of the persons who view the picture.

F-43. To most persons over the age of 18 harmful effects of such conduct would be suggested.

F-44. To most children and persons in their adolescence, harmful effects would not be suggested.

F-45. The age of eighteen is a reasonable modal point over which the consequences of such conduct would be reasonably inferred and under which they would not.

F-46. The words immorality and obscenity have many meanings and the Ordinance itself neither states nor clearly embodies any given meaning.

F-47. Sexual relations between an unmarried adolescent and an adult and between unmarried adolescents are clearly contrary to the mores of the preponderant majority of the people of the City of Chicago, of the State of Illinois, and of the United States. Such conduct is ethically disapproved, condemned and termed immoral by most and obscene by some.

F-48. The City offered as its definition of immorality and obscenity the following words covering this same Ordinance from the opinion of the Supreme Court of Illinois in *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2nd 334, in which, after equating the terms immoral, and obscene as used in the Ordinance, the Court said:

> "That a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person."

F-49. When considered as a whole, the calculated purpose of the film in litigation is not substantially to arouse the sexual desires.

F-50. The testimony of the censorship authorities showed that some of them were sexually stimulated by the film but that a majority were not.

Appendix A

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F-51. The evidence further showed that the majority of the censorship authorities did not take into consideration the quesfion whether or not the picture tended to arouse sexual desires.

F-52. The censorship authorities did not take into consideration the artistic merit of the film.

F-53. The censorship authorities did not take into consideration whether the picture was a classic or based on a classic.

F-54. The Plaintiff concedes that the Commissioner of Police is a great police officer, that his Deputy in Charge of Censorship is an honest, industrious, able police officer, and that the members of the board are conscientious, honorable, well-meaning citizens.

F-55. The evidence shows that there are no particular qualifications for appointment to the Board.

F-56. None of the members has any special education, training or skill in the fields of sex, motion pictures or the arts.

F-57. The film has been shown in over 150 cities in the United States.

F-58. There was no evidence offered of any increase in crime, sexual or otherwise, or other harmful effects traceable to the exhibition of this picture where it has been shown.

Appendix A

Master's Report

F-59. The motion picture received two awards: The Diploma of Merit at the Eighth International Edinburgh Film Festival, and the Grand Prize for French Cinema of the French Society for the Encouragement of Art and Industry.

F-60. The evidence shows that these are the equivalent of the American Oscar awarded to American films by the American Academy of Motion Pictures.

F-61. A number of published reviews were introduced in evidence by Plaintiff and the preponderance of opinion in these reviews is that the film has substantial artistic merit.

F-62. Some of Plaintiff's own exhibits indicate however, that the motion picture is a sophisticated affair primarily for adults.

F-63. Some of Plaintiff's own exhibits expressed the view that this motion picture is definitely not for children.

F-64. The City requested that the Master apply the aforementioned definition of the Illinois Supreme Court to the film upon the basis of his own reactions to the film.

F-65. The Plaintiff agreed that this might be done without conceding that the Illinois Supreme Court's definition was binding and without conceding its other legal positions, namely that the Ordinance was un-

constitutional on its face, that the procedures of the censorship authorities were unconstitutional, and that the film itself was neither immoral nor obscene.

F-66. The Master expressed his reluctance to act as a censor, especially where one of the underlying issues was whether anyone could act as a censor.

F-67. The Master further realizes that his findings in this respect must necessarily in large part be subjective at least in the sense that the Master is uncertain how far his reaction to the film is the same as the reactions of others who might see it.

F-68. However, the Master has acceded to the request of the City and the agreement of the Plaintiff and submits his findings in this respect hereunder.

F-69. Concerning the applicability of the definition, the Master finds from viewing the film:

a. That when considered as a whole, the calculated purpose of the film is not substantially to arouse sexual desires.

b. That the dominant effect of the film when considered as a whole, however, would substantially arouse sexual desires in some normal adult persons; would not substantially arouse sexual desires in other normal adult persons; and would not arouse sexual desires at all in other normal adult persons.

c. That the Master cannot determine with any degree of accuracy even in rough percentages the com-

parative number of persons who would be substantially aroused, slightly aroused and not aroused at all.

d. That the picture is more likely to arouse sexual desires in the normal adult person than for example, a street car, a flag pole, a pocket book or a lock of hair, but less likely to arouse sexual desires in the normal adult person than for example, a pretty girl in a modern bathing suit, a dancing line in a musical comedy or the many advertisements appearing in reputable publications for lingerie, cigarettes and a large variety of other products.

e. That the dominant effect of the film on substantial numbers of children and adolescents under the age of 18 might well be to arouse their sexual desires.

f. That its exhibition to juveniles and adolescents might lead to an increase among them of seduction, delinquency and statutory rape.

g. That the exhibition of the picture to such juveniles and adolescents would misinform and mislead substantial numbers of them as to the moral attitudes of our society and as to the serious consequences to juveniles and adolescents of emulating the conduct dealt with in the film.

F-70. The Master makes the same findings also when he considers his viewing of the film together with all the other evidence introduced.

F-71. In making the above findings with regard to the effect of showing the film to juveniles and adoles-

cents, the Master is mindful of the circumstances under which motion pictures are often viewed by juveniles and adolescents.

F-72. The Master has in mind for instance, the prevalence of romancing and spooning among juveniles and adolescents in motion picture theaters and in automobiles at outdoor theaters.

F-73. No attempt was made by the City to inform the censorship authorities of, or to require them to apply, the standards of immorality and obscenity set forth by the decision of the Illinois Supreme Court in *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 344.

F-74. The censorship authorities made no attempt to nor did they apply these standards.

F-75. No standards were prescribed or suggested by the City to be used by the censorship authorities in determining whether a motion picture is immoral or obscene other than the Ordinance itself.

F-76. The censorship authorities have not developed any consistent standards, and many of the individual tests used by the censors are irrelevant to any notion of immorality or obscenity.

F-77. The Master is unable to find that the picture is immoral or obscene under the definition of the Supreme Court of Illinois.

F-78. The Master is unable to find that the picture is immoral or obscene except as hereinafter set forth.

F-79. If the Ordinance means that a picture which while not showing the actual conduct, implies that conduct has taken place, which is clearly contrary to the mores of the preponderant majority of the people of the City of Chicago, or of the State of Illinois or of the United States, is immoral or obscene, then in that sense the picture is immoral or obscene.

F-80. If the Ordinance means that such a picture is immoral or obscene if it also suggests that such conduct may be pleasant without clearly showing or clearly suggesting the harmful consequences of such conduct, then in that sense the picture is immoral or obscene.

Conclusions of Law

C-1. The Court has jurisdiction of the parties and of the subject matter of this cause of action which is properly brought under Sections 1331 and 1332 of Title 28 of the United States Code.

C-2. The right of freedom of expression is inherent in our law, basic in our philosophy of government, essential to our way of life and guaranteed by the First and Fourteenth Amendments to our Constitution.

C-3. The greatest protection possible will be afforded this right consistent with other basic rights or interests.

C-4. Our Courts have been even more zealous in protecting this right where prior restraints are involved than in the area of punishment for abuse.

C-5. But the right of freedom of expression is not unlimited.

C-6. And even protection against prior restraints is not unlimited.

C-7. However, the limitation of protection against prior restraints will be recognized only in exceptional cases.

C-8. Such limitations will be considered in cases such as where there is clear and present danger to the security of the nation, where there is an incitement to violence, where the expression itself has the harmful effects of force rather than an appeal to reason, or where some other high and overriding interest or right requires it.

C-9. But such limitations will be permitted as narrowly as possible to accommodate these other rights or interests, and must themselves be limited and controlled by definite, reasonable and practicable standards.

C-10. Expression by means of motion pictures is included within the protection afforded freedom of expression by the First and Fourteenth Amendments to the Constitution.

C-11. With regard to the present case, one question before us is whether a City Ordinance insofar as it directs the City authorities to prevent the exhibition of a motion picture on the ground simply that it is "immoral or obscene" is unconstitutional as an infringement of the right to freedom of expression.

C-12. The words "immoral or obscene" each have so many meanings and are so vague that it is impossible to conclude either (a) what if any overriding interest the Ordinance seeks to protect or (b) that standards are provided adequate to confine the limitation on freedom of expression to the area in which such a limitation might be recognized.

C-13. On its face therefore, this Ordinance appears to be unconstitutional.

C-14. However, before declaring State Statutes or City Ordinances unconstitutional for vagueness and lack of standards, the Federal Courts may look for clarification and standards to the decisions of the State's Courts with regard to the enactments in question.

C-15. This Ordinance and the very words "immoral and obscene" were recently before the Supreme Court of Illinois in *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334.

C-16. In the opinion in that case the Illinois Supreme Court equated the terms immorality and obscenity as used in the Ordinance and held "that a

motion picture is obscene within the meaning of the Ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic and other merits the film may possess".

C-17. The Court also held that "In making this determination the film must be tested with reference to its effect upon the normal, average person."

C-18. The Court further held that the determination of the censor authorities was subject to judicial review and that upon such review "the plaintiff does not carry a burden of proving that that action was arbitrary and unreasonable, but rather that it must affirmatively be made to appear that the film fairly falls within the proscriptive terms of the ordinance".

C-19. Thus the Supreme Court of Illinois has defined the terms "immoral and obscene" so that the interest which the City seeks to protect by its limitation on freedom of expression may be recognized.

C-20. At the same time the Supreme Court of Illinois attempts to furnish a standard by which the limitation may be applied and by which it may itself be limited.

C-21. Moreover by its holding the Supreme Court of Illinois provides certain procedural requirements in order to assure due process in the application of the Ordinance.

C-22. It now becomes our task in the light of this definition of the Supreme Court of Illinois to determine first, whether the interest therein disclosed is adequate to justify the limitation which the Ordinance seeks to impose on the right of freedom of expression.

C-23. With due respect to the high standing of the Supreme Court of Illinois before the bar of this state and of the country generally, and for the ability and breadth of view of the Justice who wrote the opinion, we are unable to conclude that the City's interest in preventing the probability of the arousal of sexual desires in normal persons is so overriding that it justifies the City's attempt to limit the basic right of freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution.

C-24. A moment's reflection, not only on the literature and art of our country, but also, for instance, its advertising, its theatre and television, its motion pictures and newspapers, its songs and music, its fundamental institutions of courtship, marriage and the family, and on many other phases of our way of life, and the communications incident and desirable or necessary thereto, casts great doubt on the proposition that sexual desires or their arousal are in themselves evil, or considered evil by the preponderant majority or even by a substantial minority of our people.

C-25. That the mere arousal of sexual desires in itself is not an evil is implicit not only in the contentions of plaintiff's counsel, but in the testimony of some of the members of the censorship board.

C-26. Nor must the Court be unaware that there is substantial, and perhaps preponderant, opinion among physicians, psychiatrists and other social scientists, among philosophers, lawyers and social workers, and among the people generally, that sexual desires and their arousal are an accepted part of our way of life.

C-27. At least it cannot be concluded that, for the purposes of limiting the basic constitutional protection to freedom of expression, arousal of sexual desires in normal persons is in the same category as danger to the nation at war, or incitements to riots and acts of violence, or to the overthrow by force of orderly government, or even with expressions which have the effects of force.

C-28. The Master is impelled to the conclusion and does conclude that the interest of the State in preventing the probability of the arousal of sexual desires in normal persons is not a sufficiently overriding consideration to justify an Ordinance authorizing prior restraint on freedom of expression.

C-29. This is not to say (and the Master cannot emphasize this too strongly) that to prevent the arousal of sexual desires among certain classes of persons under certain circumstances may not concern the State to the extent that its interest may be overriding and justify a carefully drawn limitation even on the basic protection afforded freedom of expression against prior restraint.

C-30. The record shows and the parties are fully aware of the Master's deep concern since viewing the picture with the problem of permitting its exhibition to children and adolescents.

C-31. The State has a basic interest in the welfare of its children and adolescents. This also is inherent in our way of life and embodied in all areas of our law. Included in this interest are their proper education and their special protection against harm because of their tender susceptibilities, their immaturity and their inexperience.

C-32. This interest is sufficiently overriding so that under proper circumstances a carefully drawn limitation upon the protection afforded freedom of expression even against prior restraints should be recognized.

C-33. After viewing the picture, the Master asked the parties whether they could give special attention in their presentation of evidence, their arguments, their briefs or possibly by stipulation, to the circumstances under which motion pictures are shown to and viewed by children and adolescents; to the probable effects upon them of the exhibition of this picture to them; and to the possibility of excluding them even though the Ordinance should be held invalid or inapplicable to this picture.

C-34. Counsel expressed a desire to comply with the Master's request but because of limitations of time and expense were unable to do so to the extent they

and the Master desired. As a result the Master had considerable difficulty preparing a report which he was of the opinion should include findings, conclusions and recommendations in this area.

C-35. However, for the purpose of this report as it regards this picture, that problem has now been resolved. For the Master is in receipt of assurance from Plaintiff's counsel that Plaintiff will not permit this picture to be exhibited to persons under the age of eighteen. The Master considers this age a practicable, modal line between adolescents and adults.

C-36. The Master is unable to conclude that the Ordinance clearly discloses the interest which the City seeks to protect against the right of freedom of expression, or standards, or procedures by which the limitation on the right may be determined.

C-37. The Master is unable to conclude that the film falls within the definition of immorality and obscenity set forth by the Supreme Court of Illinois.

C-38. The Master is unable to conclude that the interest disclosed by the Supreme Court of Illinois is so overriding that it can support the limitation on freedom of expression embodied in the Ordinance.

C-39. Yet the Court whether or not it adopts all or any of the foregoing conclusions of the Master concerning the interest and standards disclosed by the Supreme Court of Illinois, may still desire to examine

the interest and standards if any, and the procedures, disclosed in the actual operations of the City's censorship authorities.

C-40. The Master is constrained to conclude that as revealed by the evidence in this case, the censorship authorities in their activities generally and particularly with reference to the censorship of this picture, were either unaware of or else completely disregarded even the interest disclosed and the standards provided by the Supreme Court of Illinois.

C-41. The Master further concludes that the operations of the censorship authorities neither disclosed any overriding interest they were protecting nor revealed any consistent standards they were applying.

C-42. The Master therefore concludes that, even if the Court should find the Ordinance valid on its face or by construction of the Illinois Supreme Court, the application of the Ordinance by the censorship authorities was unconstitutional, and particularly so with reference to the film entitled the "Game of Love."

C-43. The Master wishes to make it clear to this Honorable Court that he in no sense means to imply that the censorship authorities are not high minded, capable public servants. On the contrary, they are to be commended for their conscientious devotion to their duties as they see them and for their cooperation and courtesy as witnesses.

Appendix A

Master's Report

C-44. The Master has read and studied the First and Fourteenth Amendments; many of the cases of the United States Supreme Court, of the Illinois Supreme Court and of other Courts dealing with these amendments and with the right of freedom of expression; many other works of literature and law upon the subject; the Ordinance in question; the transcript in this case; and the briefs of counsel. The Master has viewed the picture and listened to the arguments of counsel. Yet the Master profoundly doubts whether at least under this Ordinance he could do any better job of censoring motion pictures than these five citizens and excellent public servants.

C-45. The difficulties seem to arise from the Ordinance itself and perhaps from the statute under which it was enacted. These were passed many years ago and are not young and vigorous enough to contend with the tremendous developments in science, education, public opinion and constitutional law. Perhaps a new Ordinance, clearly disclosing overriding interests, carefully limited, defining standards, and providing for proper procedures, would receive constitutional recognition as a limitation even on the protection afforded against prior restraint on freedom of expression. And perhaps such an Ordinance could be constitutionally administered by persons like the members of the censor board or by these very members themselves.

C-46. But assuming that the Ordinance should be allowed to stand, there still remains to be reported the Master's conclusions as to the remaining ques-

tion: Whether the motion picture is immoral or obscene?

C-47. The Master concludes that it has not been made affirmatively to appear as required by the Illinois Supreme Court that with reference to its effect on the normal, average person, the film's calculated purpose or dominant effect is substantially to arouse sexual desires, and that the probability of this effect is so great as to outweigh whatever artistic or other merits the film possesses.

C-48. The Master further concludes that when considered as a whole, neither the calculated purpose nor the probable dominant effect of the film is substantially to arouse sexual desires in the normal average person, nor is the probability of such an effect so great that it outweighs the artistic or other merits of the film.

C-49. The Master comes to these conclusions concerning the effect of the film whether he considers only the testimony and exhibits introduced into evidence by the Plaintiff; or only his own viewing of the film introduced by the Defendants; or whether he considers both.

C-50. The Master further concludes that the public exhibition of a motion picture to adults cannot be restrained merely because it implies conduct and deals with situations which are contrary to the mores of a preponderant majority of the community or of the State or of the nation, even if it does not express or

clearly suggest the harmful consequences of such conduct.

C-51. The Master further concludes that Plaintiff has been directly damaged by not being permitted to exhibit the film and will continue to be so damaged unless Defendants are restrained from interfering with its exhibition.

Recommendations

R-1. That the Court adopt the Findings of Fact and Conclusions of Law herein submitted;

R-2. That the Defendants be restrained from interfering with the public exhibition of the motion picture entitled "The Game of Love";

R-3. That the Plaintiff be restrained from the exhibition of the motion picture to persons under the age of eighteen;

R-4. That the Master's Certificate of Costs be approved; the Master's fees paid by the application of the funds now on deposit with him and the payment of the balance by Plaintiff; and upon such payment the Plaintiff's bond be discharged and the Costs taxed against Defendant, City of Chicago.

Respectfully submitted,

David J. Shipman,
Master in Chancery United States District Court.

Dated at Chicago, Illinois, this 31st day of January, 1956.

APPENDIX B

Verdict

UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

We, the undersigned jurors, having been directed by the Court to view the film and hear the sound transcription simultaneously of the movie called "The Game of Love", and having done so, we do hereby find that the same is not an obscene picture and is fit for public showing.

Stanley Talbert

And afterwards on, to wit, the 21st day of March, 1956 there was filed in the Clerk's office of said Court a certain Memorandum Of The Court in words and figures following, to wit:

Memorandum

UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

This action is before the Court upon the objection of the defendants to the Master's Report.

Section 155-4 of the Municipal Code of the City of Chicago provides as follows:

> "Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the

commissioner of police for examination or censorship.

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

"In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final."

The same ordinance was before the Supreme Court of Illinois in the case of *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2nd 334. In that case, the court speaking through Chief Justice Schaefer, defined the term "obscene" as follows:

"That a motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if

the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person."

The movie in question is entitled "The Game of Love", which is an adaption of a novel entitled, "Le Ble en Herbe" written by the French authoress Gabrielle Claudine Jouvenal under the pen name of Collette.

The film features the experience of two adolescents of approximately sixteen years of age, a boy, Philip, and a girl, Vinca. They are vacationing on the coast of France with their respective families who live in the same boarding house.

At the very outset, Vinca displays a romantic attachment for Philip who remains indifferent.

During the opening stages of this movie, Philip is shown canoeing off the coastal shore, when the boat overturns and he loses all of his clothes. Swimming back, he comes upon the shore in the midst of a group of convent school girls who are having a beach outing under the supervision of two nuns. Philip finds the small beret of one of the girls, covers himself in a suggestive manner, and begins to run along the beach. The girls he meets along the way home, however, tell him there is no longer any need for him to cover himself. Later, he is taken into custody by the local police for indecent exposure but released when his parents and Vinca explain the circumstances.

As the story develops, an adult woman of approxi-

Appendix B

Memorandum

mately 30 years of age, comes to the coast. Philip delivers bread to her home and she is attracted by him. It is clear from the film and its dialogue that she seduces him and that they consort with each other. The woman is shown locking herself and the boy in her sleeping quarters for the night. For several days and nights thereafter, Philip is constantly in her company at her house. The woman suddenly terminates the relationship and refers to Philip as a passing vacation "whim".

The film closes with a church scene from which it could possibly be implied that Philip and Vinca will marry.

On May 6, 1955, the plaintiff applied to the defendant Police Commissioner for a permit to exhibit the film in question. On June 2, 1955, the Commissioner notified the plaintiff that the application for permit was denied on the ground that the Censorship Board had rejected the film because it was not acceptable to standards of decency, with immorality featured and dialogue unfit.

On June 6, 1955, the plaintiff appealed the decision of the Commissioner to the Mayor.

On June 20, 1955, this appeal was denied on the ground that the film was immoral and obscene. The action in the District Court of the United States followed, jurisdiction of which was based on diversity of citizenship and upon the alleged infringement by the local authorities of the plaintiff's rights under the 1st and 14th Amendments of the United States Constitution.

Pursuant to the urgent request of the plaintiffs,

the Master took full and complete evidence and rendered three basic rulings: (1) the calculated purpose of the film in litigation is not substantially to arouse the sexual desires within the definition of the Supreme Court of Illinois as announced in the case of *American Civil Liberties Union* v. *Chicago, supra:* (2) The interest of the State in preventing the probability of the arousal of sexual desires in normal persons is not a sufficiently overriding consideration to justify an ordinance authorizing prior restraint on freedom of expression; (3) The ordinance in question is unconstitutional because of vagueness and lack of standard.

The Master was right when he ruled against the exhibition of the film to persons under the age of eighteen. That, for the purpose of enforcement of the restriction, is of little value. It is this Court's view that he did not go far enough. The Court had the opportunity to and did view the film and it finds that the local censorship authorities were warranted in finding it obscene within the recent definition of the Supreme Court of Illinois. The dominant tone of the film is sexuality. The young hero's accidental loss of wearing apparel during the course of the canoeing accident in and of itself is not startling. The fact, however, that he is depicted in the nude as he comes from the water before the French convent girls who have historically been associated with rigidity and seclusion, serves only to emphasize the hero's natural state and to focus the attention of the audience on it. The major part of the movie then dwells on his illicit relationship with an adventurous adult woman, and

later with Vinca. The film appears to casually write off this unconventional behavior as a mere interlude in the maturing process of the young hero.

The Court is unable to detect any purpose other than an emphasis upon its sexuality.

The serious problem which confronts the Court in this action is the question whether the interest of the State in this particular area is a sufficiently overriding consideration as to justify an ordinance authorizing a prior restraint upon the freedom of expression. Specifically, does the First Amendment to the Federal Constitution allow a local authority to censor films under the statute designed to prevent the exhibition of obscene movies? The Master has answered in the negative. This Court is of the view that the First Amendment allows such limitation. The right of free speech is a political right granted by the First Amendment. It is not absolute and unlimited. In the case of *Kear* v. *Minnesota,* 283 U. S. 697, the Supreme Court of the United States said at page 716:

> "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."

Appendix B

Memorandum

It should be noted that the Court placed "the primary requirements of decency" on a parallel level with matters relating to national security.

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, the court stated, at pages 571-572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

This principle of law was reaffirmed in the recent case of *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, pages 502-503:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end

of our problem. It does follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas."

The prevention of the exhibition of obscene films in the light of the foregoing judicial announcements is consistent with the constitutional guaranty of the First Amendment. It is a proper exercise of the police power reserved to the individual States. In the light of the language of the Supreme Court in the cited cases, this Court cannot agree with the suggestion of the plaintiff that the individual States and their municipalities must wait until a questionable film is shown and then resort to its remedy by way of protracted criminal proceedings.

This Court is aware of the recent decision in *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870, which is vigorously advanced by the plaintiff in support of its position. In the absence of a complete record, the specific ground for the *per curiam* order of reversal is not ascertainable. In the light of the foregoing cases, which have never been overruled, and in view of the fact that the Supreme Court in the *Burstyn* case expressly reserved decision on the question as to whether the local authorities can censor and prevent the showing of obscene films, this Court refuses to assume that the Supreme Court decided so vital a question by way of a *per curiam* order.

Finally, the terms "immoral" or "obscene" are not so vague and uncertain as to render the ordinance in question unconstitutional. First, this Court agrees with the analysis and ruling of the Supreme Court of Illinois that the term "immoral" is little more than a synonym for "obscene". *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 348.

The term "obscene" has been the target of constitutional attacks in criminal prosecutions under 18 USCA 1461, which proscribes, among other things, the mailing of obscene articles through the mails. These attacks have been grounded on the contention that the term in question does not lay down a definite standard of criminal liability, thereby rendering the statute unconstitutional. This contention has been overruled. (*Rosen* v. *U. S.*, 161 U. S. 29; *Tyomies Publishing Co.* v. *U. S.*, 211 F. 385; *U. S.* v. *Rebhuhn*, 109 F. 2d 512.)

If the term "obscene" so sufficiently provides a definite standard of criminal liability in the cited statute within constitutional requirements that it can support a judgment of conviction and possible commitment of the offender to a penal institution, *a fortiori* it must be equally definite and certain for purposes of licensing.

If this ordinance is to be voided for the reason that the terms "obscene" and "immoral" are too vague and indefinite, the State's police power in the area of health and morals, which has always enjoyed constitutional sanction, will be seriously invaded and reduced by the film industry, which currently presents one of

the most popular and effective media of communication.

The *Burstyn* case is distinguishable from the case at bar. In that case, the Supreme Court dealt with the term "sacrilegious". It is a highly technical term in the field of theology and is open to a variety of meanings and interpretations depending upon which religious sect is consulted for a definition. The term "obscene", however, rests upon principles of basic morality. As Justice Harlan said in the *Rosen* case, everyone "must take notice of what in this enlightened age is meant by decency, purity and chastity in social life and what must be deemed obscene, lewd and lascivious."

This Court holds that the film in question is obscene within the aforesaid definition of the Supreme Court of Illinois; that the local municipal authorities properly exercised a police power and that the ordinance is not unconstitutional.

Objections of the defendants to the Master's Report will be sustained.

Enter:

J. S. Perry,
Judge.

March 21, 1956.

Appendix B

Order on Objections

IN THE UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

This cause came on to be heard on the Master's Report and defendants' objections thereto and on the objection of the plaintiff to the impanelling of a Jury. This Court has carefully examined the pleadings and evidence, and files simultaneously herewith its memorandum.

It is, therefore, Ordered—

(1) That objection of plaintiff to the impanelling of a jury be and it is hereby sustained, and the order impanelling said jury and the verdict of said jury be and they are hereby vacated and set aside

(2) That the objections of the defendants to the Master's Report be and they are hereby sustained

(3) That defendants file appropriate findings of fact and conclusions of law and an appropriate decree in accordance with this order and memorandum of this Court on April 2, 1956 at 10:00 A. M.

(4) That plaintiff file its objections, if any, on or before April 15, 1956 and that briefs in support thereof and in opposition thereto be filed in accordance with Rule 13 of the Rules of this Court.

Appendix B

Order Amending Master's Report

IN THE UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

It Is Ordered by the Court that leave be and hereby is granted to amend the Master's Report on its face as follows:

3rd line, page 14, change "are" to "is"

9th line, page 17, change "adults" to "Adolescents"

14th line, page 22, change "persons" to "person"

Order Amending Memorandum

IN THE UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

On its own motion, this Court, pursuant to the provisions of Rule 60(a) of Federal Rules of Civil Procedure which provides for the correction of clerical errors at any time, corrects lines 13 and 14 on page 6 of its Memorandum heretofore filed, to read as follows: "The right of free speech is a political right guaranteed by the First Amendment."

Appendix B

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

* * (Caption—55-C-1006) * *

This cause came on to be heard on the report of the Master in Chancery David J. Shipman, the defendants' objections thereto and the objections to the impaneling of a jury, and the court having carefully examined the said Master's Report, the defendants' objections thereto and considering the plaintiff's objections to the impaneling of the jury and having carefully examined the pleadings and evidence in this cause makes the following findings of fact and conclusions of law:

Findings of Fact

The Court finds as a matter of fact:

1. That plaintiff, Times Film Corporation is a corporation organized and existing under the laws of the State of New York.

2. That defendant, City of Chicago, is a Municipal Corporation organized and existing under the laws of the State of Illinois.

3. That defendant, Richard J. Daley, is the Mayor of the City of Chicago.

4. That defendant, Timothy J. O'Connor, is the Commissioner of Police of the City of Chicago.

Appendix B

Findings of Fact and Conclusions of Law

5. That plaintiff is a citizen of the State of New York and the defendants are all citizens of the State of Illinois.

6. That the action arises under the First and Fourteenth Amendments to the Constitution of the United States.

7. That the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs.

8. That all of the defendants were properly served with summons and entered their appearances herein.

9. That this Court has original jurisdiction of this action.

10. That this Court has jurisdiction of the parties.

11. That the plaintiff has the exclusive right to distribute, to license for exhibition, and to exhibit in the City of Chicago a certain photoplay or motion picture film entitled "The Game of Love" a print of which picture was attached to the complaint as Exhibit 1.

12. That said motion picture, herein sometimes referred to as the film, is an adaptation of a novel entitled "Le Ble en Herbe" written by the French authoress Gabrielle Claudine Jourvernal under the pen name of Colette.

13. That at all times relevant to this action, the Ordinance of the City of Chicago attached to the complaint as Exhibit B was in full force and effect.

14. That on or about May 6, 1955, plaintiff applied

to defendant Police Commissioner O'Connor for a permit to exhibit the film in the City of Chicago.

15. That on June 2, 1955 defendant Police Commissioner Timothy J. O'Connor, on the recommendation of the Censor Board refused to issue a permit to the plaintiff for the exhibition of the film in the City of Chicago upon the ground that the film was obscene.

16. That on June 6, 1955 plaintiff appealed the decision of defendant Police Commissioner O'Connor to defendant Mayor Daley.

17. That on June 20, 1955 defendant Mayor Daley denied the appeal of the plaintiff and based his denial on the ground that the film was immoral and obscene.

18. That as a result the plaintiff was refused a permit to exhibit the film "The Game of Love" in the city of Chicago.

19. That except for the purpose of evidence in this case, the plaintiff has not publicly exhibited the film in the city of Chicago.

20. That the Court has viewed the said film "The Game of Love" in evidence as defendants' Exhibit 1. That the film substantially features the experiences of two adolescents of approximately sixteen years of age, a boy, Philip, and a girl, Vinca. They are vacationing on the coast of France with their respective families who live in the same boarding house. At the very outset, Vinca displays a romantic attachment for Philip who remains indifferent.

During the opening stages of this movie, Philip is shown canoeing off the coastal shore, when the boat

Appendix C

Opinion of Court of Appeals, Seventh Circuit

The ordinance now under attack, as we have seen, uses the words "immoral or obscene." The Illinois Supreme Court has held, in speaking of this ordinance, that these words are synonymous and that a motion picture is obscene or immoral, within the meaning of the ordinance, if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person. *Amer. Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334, 347.

With this interpretation of the words "obscene" and "immoral" read into the ordinance now before us, we believe that the ordinance is not vague, as contended by plaintiff. Those words are precise and they constitute a proper test in the case at bar.

3. It is true that society's *application* of such a test to specific conduct or things may and does often vary according to the period of time when, and also as to the place where, the test is applied. On a public beach in America 50 years ago a person would have been considered immorally clothed if he or she had appeared in a bathing suit of a kind which today is commonly accepted as proper. The nature and extent of raiment now considered proper when worn in some parts of Africa would presently be considered immoral if worn upon the streets of Chicago. If a girl in a theatrical production in Boston had said, 50

years ago, "I am pregnant", the producer would have been charged with staging an immoral show. Today in America—even in Boston—the same incident would go unchallenged.

Despite these time and place variations in the consensus of people, there is at any given time and place substantial agreement as to what conduct or things are proscribed by the test as obscene and immoral. A violation of the proscription is generally and promptly detected and protested by ordinary persons, whether, for instance, it be an indecent display upon a public street, an improper remark in the living room of a home, or a vile and filthy exhibition of a person or persons at a public picnic or baseball game. The ordinary person knows what is obscene and immoral. That knowledge is a workable basis for regulation of such matters and it may be utilized by the chosen representatives of the people, in a state or political subdivision thereof, as a basis for legislative action aimed at the suppression of public obscenity and immorality. The public exhibition of moving pictures falls within the ambit of such regulation. The ordinance in question is the result of such action by the city council of Chicago.

The first and fourteenth amendments of the federal constitution do not, and were never intended to, shield public peddlers of obscenity and immorality. The ordinance now under attack is not unconstitutional on the grounds asserted.

4. The film, as an exhibit in this case, was projected before and viewed by us. We found that, from

beginning to end, the thread of the story is supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts. In the introductory scenes a flying start is made when a 16 year old boy is shown completely nude on a bathing beach in the presence of a group of younger girls. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. The words spoken in French are reproduced in printed English on the lower edge of the moving film. None of it palliates the effect of the scenes portrayed.

We do not hesitate to say that the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires. We are of the opinion that the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. We think these determinations are supported by the effect which this film would have upon the normal, average person. There is nothing in the record before us to indicate that the commissioner of police or the persons to whom he referred the film for inspection are not normal,

average persons. The record indicates the contrary. We agree with the opinions of the judge of the district court, the police commissioner and the persons whom he caused to inspect the film. All of them viewed the picture. They found it obscene and immoral.

We, therefore, conclude that the ordinance, as written and as applied to the film in this case, is not violative of the rights of plaintiff under either the first or fourteenth amendment of the constitution of the United States.

For the reasons hereinbefore set forth, the decree of the district court is affirmed.

AFFIRMED.

APPENDIX D

Municipal Code of the City of Chicago, Sections 155-1 to 155-7

Exhibit "B".

Chapter 155.

Motion Pictures.

Exhibition.

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city, any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devies, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

Appendix D

Municipal Code of the City of Chicago, Sections 155-1 to 155-7

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. (Amend. Coun. J. 12-21-39, p. 1396).

155-2. Before any such permit is granted, an application in writing shall be made therefor, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the commissioner of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted, it shall be in writing and in such form as the commissioner of police may prescribe.

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested

has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the mind of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to

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Municipal Code of the City of Chicago, Sections 155-1 to 155-7

tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense, and the admission of each person under twenty-one years of age, or permission to remain for such person under twenty-one years of age, shall constitute a distinct and separate offense.

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering such theater, hall, room or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time.

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor; provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other

exhibitor is first duly mailed by the transferee or lessee to the commissioner of police. Any number of transfers or leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee, or lessee and that such written notice be first mailed to the commissioner of police.

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion picture or otherwise put the same into circulation for purposes of exhibition within the city.

APPENDIX E

Amendments to the Constitution

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.